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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12
13 Gregory Bender,

14 Plaintiff,

15 v.

16 Nokia Inc.,

17 Defendant.
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Case No. C 09-01247 (MMC)

**NOKIA INC.'S RULE 12(B)(6)
MOTION TO DISMISS GREGORY
BENDER'S AMENDED COMPLAINT
FOR FAILURE TO STATE A CLAIM**

DEMAND FOR JURY TRIAL

Date: September 25, 2009
Time: 9:00 a.m.
Place: Ctrm. 7, 19th Floor
Judge: Maxine M. Chesney

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35 U.S.C. § 271(b)7

PLEASE TAKE NOTICE that on September 25, 2009, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Courtroom 7 of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Ave., 19th Floor, San Francisco, CA 94102, the Honorable Maxine M. Chesney presiding, defendant Nokia Inc., (“Nokia”) will and hereby does move the Court for an order dismissing plaintiff Gregory Bender’s (“Bender’s”) Amended Complaint.

This is a motion to dismiss for failure to state a claim made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Nokia seeks dismissal of Bender’s Amended Complaint or, at least dismissal of Bender’s allegation of induced infringement therein. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in Support thereof, the Declaration of Cora L. Schmid and exhibits thereto, all pleadings and papers filed in this action, and upon such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Bender’s initial Complaint contained no factual allegations beyond the location of the parties and Bender’s ownership of the patent-in-suit. (See D.I. 1.)¹ Two months later, Bender amended his Complaint – yet the Amended Complaint still contains no factual matter sufficient to state a plausible claim for relief. (See D.I. 5.) Indeed, Bender has not even alleged facts sufficient to identify a specific product or products accused of infringement as required by the Federal Circuit in *McZeal v. Sprint Nextel*, 501 F.3d 1354 (Fed. Cir. 2007), and has failed to allege infringing activity within the United States, as required by *Advanced Analogic Tech., Inc. v. Kinetic Tech*,

¹ D.I. numbers refer to docket entries in the present action

1 *Inc.*, No. C 09-1360-MMC, 2009 U.S. Dist. LEXIS 57953 (July 8, 2009).² Absent such specific
 2 factual allegations, certified under Rule 11 of the Federal Rules of Civil Procedure as having or
 3 being likely to have evidentiary support, Bender's complaint should not proceed past the pleading
 4 stage under the facts of this case. Bender has already had ample opportunity to resolve these
 5 problems, and has already amended once as of right. Nokia respectfully submits that under these
 6 specific circumstances, Bender's Amended Complaint should be dismissed with prejudice and
 7 without leave to amend.

8 Bender's failure to allege sufficient facts was not an accident, but the apparent result of a
 9 failure to perform a sufficient pre-filing Rule 11 investigation.³ Bender sued 37 defendants in 24
 10 lawsuits, and in each suit, Bender submitted complaints that provide either the barest description
 11 of an accused device, or fail to name an accused device at all. (*See, e.g.*, Amended Complaint
 12 against DSP, Schmid Decl. Ex. A.) In Rule 26 conferences conducted, and in at least one Case
 13 Management Conference, Bender's counsel has requested that the Patent Local Rules be turned
 14 on their head to force defendants to produce schematics and other technical information before
 15 Bender is required to serve his Rule 3-1 infringement contentions. (*See* Comment Re Motion to
 16 Relate Cases, Schmid Decl. Ex. B at pp. 1-2.) Bender has served his initial infringement
 17 contentions under Rule 3-1 of the Patent Local Rules in the first-filed of these 24 actions and,
 18 instead of including the required chart "identifying specifically where each limitation of each
 19 asserted claim is found within each Accused Instrumentality," Bender merely included bald
 20 assertions that "it is inherent that the product will have a number of" each purported element in
 21 question. (*See id.* at Ex. 2 and Ex. 3.)

22 ² The *Advanced Analogic* decision was not was not briefed under *Iqbal*.

23 ³ Under Rule 11 a plaintiff's attorney must "compare the accused device with the
 24 construed patent claims." *Antonious v. Spalding & Evenflo Cos.*, 275 F.3d 1066, 1073-74 (Fed.
 25 Cir. 2002) (Rule 11 requires "actual evidence uncovered during the pre-filing investigation, that
 26 each claim limitation reads on the accused device"); *see also Gonzales v. Texaco Inc.*, No. C 06-
 27 02820-WHA, 2007 U.S. Dist. LEXIS 81222, *35 (N.D. Cal. Oct. 16, 2007) ("Counsel were
 28 obligated to investigate *first* and sue *second*, not the other way around.") (emphasis in original);
Micromesh Tech. Corp. v. Am. Recreation Prods, Inc., No. C 06-6030-MHP, 2007 U.S. Dist.
 LEXIS 64241, *11-12 (N.D. Cal. Aug. 29, 2007) (a plaintiff must not only obtain samples of the
 accused product, but also analyze the product samples). Indeed, further factual development may
 lead Nokia to file a separate Rule 11 challenge.

1 Bender seems to be guessing that Nokia – and the more than 25 other defendants he has
 2 accused of infringement on similar complaints – are somehow, somewhere, selling circuits that
 3 fall within his claims. His approach is akin to having a patent on a special kind of light bulb,
 4 walking down the street at night and seeing lights on in people’s homes, and then suing them all,
 5 assuming that at least one of the homes will have at least one of his special bulbs. But Bender
 6 must do more: “Where a complaint pleads facts that are merely consistent with a defendant’s
 7 liability, it stops short of the line between possibility and plausibility of entitlement to relief.”
 8 *Iqbal*, 129 S. Ct. at 1949 (quotations omitted).

9 This is a case about a specific type of analog amplifying circuit, sometimes found in chip
 10 sets that may contain thousands of different circuits, but the point is the same – Bender’s
 11 Amended Complaint lacks factual allegations to support a conclusion that any particular chip set
 12 in any particular Nokia product contains the particular circuits claimed by Bender. At best, his
 13 conclusory allegations are “merely consistent with” liability – that Nokia sells products with
 14 “high performance, high speed analog circuits” that somehow contain or utilize a “buffered
 15 transconductance amplifier,” a “current feedback amplifier,” a “high-gain current feedback
 16 amplifier,” or a “voltage feedback amplifier.” (*See* D.I. 5 at ¶ 8.) But just as alleging that
 17 someone is home, with the lights on, says nothing about whether they are using a patented light
 18 bulb, a claim that Nokia uses “high performance, high speed analog circuits” (even taken as true
 19 at the pleading stage), says nothing about whether Nokia is using Bender’s patented technology.
 20 In fact, the elements of the claims of the ’188 patent exist in a broad field of prior art. Several of
 21 the claims of the ’188 patent were recently rejected on reexamination by the U.S.P.T.O.⁴
 22 (U.S.P.T.O. Office Communication, Schmid Decl. Ex. C.)

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 24
 25 ⁴ On October 3, 2008, the U.S.P.T.O. rejected six of the ten independent claims of the
 26 ’188 patent over prior art in a non-final office action, to which the Applicant did not respond.
 27 The examiner found that the prior art discloses an electrical circuit for amplifying complex
 28 signals, including the elements of these claims in their claimed configurations. Only certain
 specific embodiments of the Applicant’s amplifier were allowed over the prior art. (*See*
 U.S.P.T.O. Office Communication, Schmid Decl. Ex. C at pp. 3-37.)

“A patent suit can be an expensive proposition. Defending against baseless claims of infringement subjects the alleged infringer to undue costs.” *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000). This Court has taken extra steps to ensure that patentees like Bender do not sue first and investigate later by adopting the patent local rules of this district in order to “require parties to crystallize their theories of the case early in the litigation.” *O2 Micro Int’l Ltd., v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006) (citing *Atmel Corp. v. Info. Storage Devices, Inc.*, No. C 95-01987-FMS, 1998 U.S. Dist. LEXIS 17564, at *7 (N.D. Cal. 1998)).

Missing from Bender’s Amended Complaint are factual allegations about any specific products, verified under Rule 11 as having or being likely to have evidentiary support, showing that such products in fact employ something Bender claimed. He has not made factual allegations that support a conclusion that specific Nokia products practice the claims of his patent nor that any infringing activity occurs within the United States, much less alleged any of the required elements of induced infringement, despite ample opportunity to do so. Under the circumstances of this action, Bender’s entire Amended Complaint, and at the very least his inducement allegation therein, should be dismissed.

ARGUMENT

I. TO SURVIVE A MOTION TO DISMISS, THE PLAINTIFF MUST STATE FACTUAL ALLEGATIONS THAT SHOW AN ENTITLEMENT TO RELIEF AND THAT HAVE OR WILL HAVE EVIDENTIARY SUPPORT

To survive a motion to dismiss under Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must allege facts that, if true, would demonstrate entitlement to relief. *Twombly*, 550 U.S. at 554-55; *see also Iqbal*, 129 S. Ct. at 1950-51. Indeed, in *Iqbal* the Supreme Court left no doubt that a complaint must contain *facts*, not legal conclusions:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts

that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” . . .

[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Iqbal, 129 S. Ct. at 1949-51 (internal citations omitted).

Even prior to *Iqbal*, patent cases required substantially more than an allegation that a defendant, by selling unspecified products, infringes a patent. *See Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1050-51 (N. D. Cal. 2004) (a complaint that is limited to a wholly conclusory allegation is “radically insufficient”); *AntiCancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal. 2007) (dismissing a complaint alleging only that the defendants infringed the patent and induced others to infringe, without specifying further facts).

II. BENDER HAS FAILED TO STATE FACTUAL ALLEGATIONS THAT SHOW AN ENTITLEMENT TO ANY RELIEF

A. Bender’s Sole Substantive Allegation Contains Only Legal Conclusions

Paragraph 8 of Bender’s Amended Complaint contains Bender’s sole substantive allegation – a sweeping accusation of, “without limitation,” Nokia’s

cell phones, computers, network drivers, high definition television sets, ultrasound machines, MRI machines, lab equipment, arbitrary waveform generators, audio amplifiers, video amplifiers, hard disc drives, ADC/DAC converters, DVD-RW players, DSL modems, CCD cameras, satellite communication technology, and other products where high performance, high speed analog circuits are used, and/or components thereof.

(D.I. 5 at ¶ 8.) This alleges that Nokia infringes by selling unspecified products that infringe in an unspecified country – a pure legal conclusion that cannot survive a motion under Rule 12(b)(6). *See Iqbal*, 129 S. Ct. at 1949-50; *see also Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517-MJJ, 2003 U.S. Dist. LEXIS 26092, *6-7 (N.D. Cal. Sept. 6, 2003) (granting a motion to dismiss where the plaintiff did not identify the accused products with specificity, and the defendant had multiple technology platforms that were implemented in numerous end-user

applications); *Advanced Cardiovascular Sys. v. Scimed Sys.*, No. C 96-0950-DLJ, 1996 U.S. Dist. LEXIS 11702, at *12-13 (N. D. Cal. 1996) (dismissing a cause of action with prejudice when the proposed amendments to the complaint failed to state a cognizable claim); *Halo Elecs., Inc. v. Bel Fuse Inc.*, No. C 07-00331-PMP, 2007 U.S. Dist. LEXIS 54419, *5-6 (D. Nev. July 26, 2007); (identifying the patents at issue and their subject matter is not sufficient to state a claim for relief absent an allegation of the manner or means of infringement). At most, Bender makes only factual assertions that (if true) *might* be consistent with infringement. But the mere consistency of Bender's allegations with liability do not show an entitlement to relief under *Iqbal*.

B. Bender's Amended Complaint Should Be Dismissed Because It Fails Both To Identify Specific Products Accused Of Infringement And To Even Allege Infringing Activity In The United States

The breadth of Bender's allegations proves the point of *Iqbal*. Bender must come forward with factual allegations that identify specific products believed to contain infringing circuits, plus factual allegations that would establish entitlement to relief. However, Bender's complaint does not apply the claims of his patent to a single product. Nor does he allege any infringing activity within the United States. He therefore did not, and presumably cannot, allege *facts* showing infringement.

Nokia "should not have to guess which of its products infringe nor guess how its products might fall within [Bender's] interpretation of the claims of the patents in suit." *Bay Indus. v. Tru-Arx Mfg.*, No. C 06-1010-WCG, 2006 U.S. Dist. LEXIS 86757, *5 (E.D. Wis. Nov. 29, 2006). By proposing to accuse a large array of unspecified products, Bender in effect is requiring Nokia to compare its numerous products to the 52 claims of the '188 patent in order to defend this case. *See id.* (requiring defendant to compare its approximately 40 products to at least 20 claims in order to formulate an answer is an unreasonable burden on defendant). Absent factual specificity, however, *Iqbal* precludes Bender's attempt to "unlock the doors of discovery" under the facts of this case.

Even the pre-*Iqbal* case of *McZeal v. Sprint Nextel* illustrates, by comparison, the plain deficiencies in Bender's amendments. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007). In *McZeal*, the Federal Circuit reinstated a complaint for patent infringement filed by

1 a *pro se* plaintiff, where the plaintiff alleged that one of defendant's specific products, the
 2 "INTERNATIONAL WALKIE TALKIE machine physically ha[s] or perform[s] all of the basic
 3 elements of the patent claims of the plaintiff and further infringes under the doctrine of
 4 equivalents." *Id.* at 1357. The court held that such allegations "met the low bar for *pro se*
 5 litigants to avoid dismissal." *Id.* at 1358. Bender, represented by counsel and held to a higher
 6 standard than Mr. McZeal, has not even alleged that *any* specific Nokia product has "all of the
 7 basic elements of the patent claims." Further, Bender has not even alleged any infringing activity
 8 in the United States, a failure that has alone been grounds to dismiss a complaint. *See Advanced*
 9 *Analogic*, 2009 U.S. Dist. LEXIS 57953.

10 Bender's strategy in this case of "sue first, accuse everything, ask questions later" that he
 11 has demonstrated in the circumstances of this action comports with neither the letter nor the spirit
 12 of the Federal Rules of Civil Procedure and Supreme Court precedent. Under Rule 8 and Rule
 13 12, Plaintiff must state *factual allegations*, which, if true, would show an entitlement to relief.
 14 Bender has not done this.

15 **C. At the Very Least, Bender's Amended Complaint Fails To State**
 16 **Claims of Induced Infringement**

17 Even should the Court chose not to dismiss Bender's entire complaint, it should dismiss
 18 Bender's allegation of induced infringement. The complaint filed by Bender alleges that Nokia
 19 induces infringement of Bender's patent in a single cursory sentence: "Nokia has performed acts
 20 and performs acts that . . . induce others to infringe, one or more claims of the '188 Patent."
 21 (Amended Complaint, D.I. 5 at ¶ 8.) Nowhere in this sentence nor in the rest of the complaint
 22 does Bender give Nokia "fair notice of what the . . . claim is and the grounds upon which it rests,"
 23 as required by Rule 8(a) of the Federal Rules of Civil Procedure under the United States Supreme
 24 Court's recent decisions. *Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1950-51.

25 The Federal Circuit has detailed three required elements for induced infringement under
 26 35 U.S.C. § 271(b). First, it is axiomatic that "inducement of infringement requires a predicate
 27 finding of direct infringement," by a third party. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d
 28 1373, 1380 (Fed. Cir. 2007); *see also ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307,

1 1312 (Fed. Cir. 2007). The patentee must also establish that “the alleged infringer knowingly
 2 induced infringement *and* possessed specific intent to encourage another’s infringement.” *ACCO*
 3 *Brands*, 501 F.3d 1307 at 1312 (quotation omitted) (emphasis added); *see also Warner-Lambert*
 4 *Co. v. Apotex Corp.*, 316 F.3d 1348, 1364 (Fed. Cir. 2003) (“[W]e have already observed that
 5 precedent holds that mere knowledge of possible infringement by others does not amount to
 6 inducement; specific intent and action to induce infringement must be proven.”) (citation
 7 omitted). The element of knowing inducement “requires evidence of culpable conduct, directed
 8 to encouraging another’s infringement, not merely that the inducer had knowledge of the direct
 9 infringer’s activities.” *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en
 10 banc in relevant part) (citations omitted).

11 Bender’s empty statement that “Nokia has performed acts and performs acts that . . .
 12 induce others to infringe, one or more claims of the ’188 Patent,” does not allege any of the three
 13 required elements of induced infringement. Each of these three failures independently requires
 14 dismissal of the inducement allegation. First, not only has Bender failed to identify the required
 15 acts of direct infringement by a third party, he has not even identified any third parties that he
 16 claims have been induced to infringe. *See Advanced Analogic*, 2009 U.S. Dist. LEXIS 57953, at
 17 *4-5 (granting motion to dismiss where plaintiff “failed to allege direct infringement by a third
 18 party”). Second, Bender’s conclusory assertion also lacks any facts that would support even an
 19 inference that Nokia has acted to induce infringement, let alone the “purposeful, culpable
 20 expression and conduct” required by *DSU*, 471 F.3d at 1306; *see also AntiCancer*, 248 F.R.D. at
 21 282 (granting motion to dismiss inducement claim where “Plaintiff has failed to plead any further
 22 facts beyond a bare statement of direct and indirect infringement”); *Ristvedt-Johnson, Inc. v.*
 23 *Peltz*, No. C 91-3273-ACW, 1991 WL 255691, at *5 (N.D. Ill. Nov. 18, 1991) (granting motion
 24 to dismiss inducement claim where “plaintiffs’ allegations are so factually insufficient that they
 25 do not even suggest how or when the defendants induced . . . [or] intended to induce Brandt to
 26 infringe on the plaintiffs’ patents”). Finally, Bender’s assertion of induced infringement should
 27 be dismissed because the assertion in the Amended Complaint fails to allege any facts that Nokia
 28 had the affirmative intent required to induce infringement. *See Coolsavings.com, Inc. v. Catalina*

1 *Mktg. Corp. & Supermarkets Online, Inc.*, No. C 98-6668, 1999 WL 342431, at *2 (N.D. Ill. May
2 14, 1999) (granting motion to dismiss inducement claim “because it does not allege the requisite
3 intent”); *Catapano v. Wyeth Ayerst Pharms., Inc.*, 88 F. Supp. 2d 27, 30 (E.D. N.Y. 2000)
4 (granting motion to dismiss inducement claim because “mere knowledge that its customers use its
5 products in the infringing manner does not demonstrate the requisite intent for claim of
6 inducement”) (citations omitted).

7 Bender’s fear that Nokia may not be a direct infringer of his patent is not a sufficient basis
8 to sustain allegations that Nokia is inducing infringement of that patent. Bender has not identified
9 any acts of inducement or intent to induce, much less even named the party that Nokia has
10 theoretically induced to infringe. Nokia has not been given the “fair notice” of an inducement
11 claim that the law requires. *See Twombly*, 550 U.S. at 555. Should Bender’s Amended
12 Complaint survive this motion, at least the induced infringement allegation within the Amended
13 Complaint should be dismissed under these facts.

14 CONCLUSION

15 For the reasons stated above, Defendant respectfully request that the Court dismiss
16 Plaintiff’s Complaint with prejudice without leave to amend. In the alternative, Defendant
17 respectfully requests that the Court dismiss the Complaint’s inducement infringement allegation.
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3 Dated: August 21, 2009
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Respectfully submitted,

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